**MEMORANDUM BRIEF ON CERTIORARI, BY INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND MID-CONTINENT OIL & GAS ASSOCIATION, AMICI CURIAE.**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 733.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, a Corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, CITY OF BATON ROUGE, LOUISIANA, *Respondents*.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.


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In view of the striking and fundamental change in position presently indulged by Commission counsel (*Comm. Br. pp. 18, 20, 34, 35, 40, 43*), as compared with the Commission findings of fact and conclusion of law (*Comm. Order. R. V. 1, pp. 82-83*), and as compared with the Commission position in opposition to certiorari (*Comm. Br. on Pet. for Cert. pp. 14-17*), *amici curiae* now wish, with consent of the Court, briefly to consider such newly developed jurisdictional theories and contentions of the Commission.

This memorandum brief supplements briefs heretofore filed herein by *amici curiae* to which respectfully the consideration of the Court again is invited.

The Commission found that:

> "Interstate, as an established course of business, is engaged in the *transportation, sale and delivery of natural* gas purchased, produced and gathered in Monroe Field, Louisiana, to Mississippi River Fuel Corporation and Southern Natural Gas Company, *at a point near Perryville in the State of Louisiana*, and to United Gas Pipe Line Company *for the account of* Memphis Natural Gas Company *at a point near Guthrie in the State of Louisiana.*"
>
> The Commission, without any reference whatever to the terms of the Natural Gas Act, nevertheless concluded, under the theory of "constant flow": that "the transportation" by Interstate Company of natural gas "from the mouths of the wells from which it is produced" and the delivery thereof "at a point near Perryville" and "at a point near Guthrie," both in the Monroe Field, Louisiana, constituted "the transportation * * * *in* interstate commerce" of such gas; and that the complete and outright local Monroe Field sales of such gas "at a point near Perryville" and "at a point near Guthrie" constituted "sale *in* interstate commerce" of such gas.
>
> (*R. V. 1, pp. 82-83*).

The Commission made no supporting finding of any kind, except the finding of "constant flow." Such is the record presented to this Court.

In contrast with the Commission findings, conclusion and order the present Commission construction of the Gas Act and of the Commission's jurisdiction thereunder is:

> "The Commission has, however, never sought to extend its jurisdiction over the sales of natural gas made by independent producers and gatherers, (1) but only over sales made by one otherwise a natural-gas company or (2) where affiliation betwen seller and pur-

chaser is involved or (3) where there is transportation in interstate commerce by the seller after completion of gathering prior to the wholesale sale. Petitioner is (1) otherwise a natural-gas company, (2) is affiliated with a purchasing natural-gas company and (3) transports the gas in interstate commerce prior to sale." (Numbering added.)

(*Comm. Br. p. 18*)

(1) The foregoing distinction sought to be drawn between "independent producers and gatherers" and "one otherwise a natural-gas company", is without foundation in Section 1(b) of the Act. The Commission view would operate to wipe out entirely *all* the statutory withholding of authority and the "specific denials of power." A company not "a natural gas company" is in no event subject to Commission jurisdiction, and the Commission now would deny the applicability of the statutory limiters to "a natural gas company." This certainly would be a simple and convenient device by which, despite the statute, to vest plenary power in the Commission. Such is not the law. (See cases cited, *Br. Amici Curiae, on Pet. for Cert. pp. 8, 26-27*).

Jurisdiction over non-jurisdictional activities and facilities cannot be created by mirrored reflection from activities and facilities which are subject to Commission regulation. A company which engages in operations and activities which subject it to Commission regulation and make it a "natural gas company," as defined in the Act, may also engage in other activities and operations which are not subject to Commission regulation. Such other non-jurisdictional activities and operations do not become subject to Commission regulation because the Company is a "natural gas company." They continue exempt from Commission control and regulation, and the Commission is not permitted to exercise any control whatever over them. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm.*, 324 U. S. 634, 641-642, 65 Sup. Ct. 821, 825).

(2) The Commission reliance upon "affiliation between seller and purchaser", which appears to be abandoned later (See, *Comm Br. p. 24*) is not supported by any *finding* or by the record. There is no "affiliation" between petitioner, Interstate Company and Southern Natural Gas Company or Memphis Natural Gas Company, and none is asserted to exist by Commission counsel. Moreover "affiliation" as such, if it exists, is not the test of jurisdiction under the Gas Act. The sole statutory test is "transportation • • • *in* interstate commerce" and "sale *in* interstate commerce", as defined in Section 2(7) of the Act, in which transportation or sale the company sought to be regulated, must participate either as a single enterprise or as part of a joint operation. It is not claimed that such is the situation here and the record would not support any such finding (See *Br. Amici Curiae, on Pet. for Cert. pp. 24-26*).

(3) Commission counsel finally come to the question of whether "there is transportation *in* interstate commerce by the seller (Interstate) after completion of gathering prior to the wholesale sale." They promptly *assert* that there is. They draw that conclusion without any analysis whatever of the Act, in disregard of the direct and specific refusal of Congress to grant the broad powers which the Commission originally sought but which nevertheless it now undertakes to exercise, and in face of the *undisputed* fact, found by the Commission (*R. V. 1, pp. 82-83*), that Interstate makes consummated "sale and delivery" of the gas here involved to the several purchasers thereof *locally in the Monroe Field, Louisiana.* Because of the fact that the gas was sold and delivered by Interstate Company *locally in the Monroe Field*, the Commission found it necessary as a foundation for any jurisdiction whatever, to resort to the finding:

> That "the natural gas • • • that is sold and delivered" *locally* in the Monroe Field, Louisiana, by Interstate Company to the three pipeline company purchasers "moves in each instant in a constant flow from

> the mouths of the wells from which it is produced through pipelines belonging to Interstate, to the compressor station of the respective purchaser, and thence through said compressor stations into the pipeline of said respective purchaser and thus into and through states other than Louisiana • • •, all without interruption, and said gas is so destined from the moment of its production." (R. V. 1, pp. 82-83).

From the foregoing position Commission counsel now recede, for they presently declare: "It is unnecessary for present purposes to determine the precise point at which interstate commerce in gas, which flows continually from the well to its destination, begins." (*Comm. Br. p. 20*).

Thus by the formula of Commission counsel the foundation is sought to be laid for a flexible, elastic and self-controlled jurisdiction, to be exercised or not in particular cases at the discretion of the Commission. And so we are told all is well. (*See Comm. Br. pp. 44-45*).

The broad and sweeping constitutional grant of power to the Federal government to regulate "commerce • • • among the several states" embraces not only those operations, activities and matters which are actually and physically "*in* interstate commerce" but also those local intrastate operations and activities including local sale and delivery of a commodity or service, which in the considered and *enacted* determination of the Congress "affect", "obstruct" or "burden" the free flow of "commerce • • • among the several states" or the regulation of which local operations and activities by the Federal government is deemed proper and necessary by Congress to foster, develop and protect such "commerce • • • among the several states."

The narrow question here involved, as in the case of every statute setting in motion Federal regulation under "the commerce clause," is "what Congress did, not what it could do." (*McLeod* v. *Threlkeld*, 319 U. S. 491, 493, 495; *Federal Trade Comm.* v. *Bunte Bros. Inc.*, 312 U. S. 348, 353, 355).

Commission counsel nevertheless indulge the easy assertion and assumption, several times repeated (*Comm. Br. pp.*

*16-17, 18, 20-21, 22, 40, 43*) that every operation and activity which Congress in any way could have incorporated into the coverage of the Act under "the commerce clause" was embraced within the plan of Federal regulatory control embodied in the Gas Act. Such is not the fact.[1]

To avoid analysis of Section 1(b) of the Act and consideration of the basic principle that the scope and coverage of each statute is determined by the terms and provisions thereof, Commission counsel, under the caption "The sales here involved were in interstate commerce", assert: (*Comm. Br. pp. 22*)

> "And although the meaning of 'interstate commerce' may *conceivably* vary in different statutes (*McLeod* v. *Threlkeld*, 319 U. S. 491, 493, [*Note:* The cited case does not so declare, but does indicate with entire clarity that "the precise scope" of each Congressional enactment is defined in and by that particular statute.] nothing in the history of the Gas Act suggests that the phrase 'sale *in* interstate commerce' was intended to have a narrower meaning than that expression had repeatedly been given by this Court in numerous types of situations. [*Note:* No such contention has been or is made in this case by petitioner or *amici curiae*.] A strong burden must rest on the party endeavoring to maintain such a proposition." [*Note:* No party to this case is endeavoring to maintain such a proposition, nor is there any such rule of law; See *Br. Amici Curiae on Pet. for Rehearing, p. 13.*] (Emphasis and notes added.)

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[1] The Gas Act provides: "The provisions of this Act shall apply to * * * transportation of natural gas in interstate commerce" and "sale in interstate commerce of natural gas for resale * * *." There is no other grant of regulatory authority contained in the Act.

The statutory "specific denials of power" (Conn. L. & P. Co. v. Federal Power Comm., 324 U. S. 515) here material are: "The provisions of this Act * * * shall not apply to any other transportation"; "or sale"; "or to the production or gathering of natural gas."

By the foregoing clearly it is sought by counsel to make it appear by assumption and indirection that the provisions of Section 1(b) of the Gas Act are in parallel with the provisions of the Tobacco Inspection Act of 1935, the Second Agricultural Adjustment Act of 1938 and the Bituminous Coal Act of 1937. These Acts were upheld and applied in the Commission cited cases (*Comm. Br. p. 21*) of *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381.

As pointed out with particularity by this Court in those cases Congress in each of such statutes, by express determination and by appropriate and specific language extended the scope of the Federal regulation there undertaken, to local operations and activities including local sales and deliveries, which it was *found*, and *enacted*, "affected", "burdened" and "obstructed" interstate commerce and with respect to which it was declared Federal regulation was necessary and appropriate to promote, foster and protect such commerce and the free and orderly current and flow thereof. Nothing in the language of Section 1(b) of the Gas Act is remotely similar to the language of statutory extension and enlargement found in the three acts referred to by Commission counsel. In the Gas Act, as in numerous other enactments, the Federal regulation authorized is limited and carefully and expressly restricted. The authority delegated to the Commission does not extend to or embrace operations and practices, including local sales and deliveries as well as production and gathering, which *may affect* but are not actually *in* interstate commerce (*Federal Trade Comm.* v. *Bunte Bros. Inc.*, 312 U. S. 349; *Comm. Br. p. 23*). See, *Br. Amici Curiae on Pet. for Cert. pp. 12-15; 15-24.*)

We quote briefly from the opinions of this Court in the cases of *McLeod* v. *Threlkeld*, *supra* and *Federal Trade Comm.* v. *Bunte Bros. Inc.*, *supra:*

Mr. Justice Reed speaking for the Court in the *Threlkeld case* declared:

"In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furtherest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language now in the Act, 'each of his employees who is engaged in commerce or in the production of goods for commerce'. The selection of the smaller group was deliberate and purposeful.

* * *

"There is no single conception of interstate commerce which can be applied to every federal statute regulating commerce."

(*McLeod* v. *Threlkeld*, 319 U. S. 491, 493, 495)

Mr. Justice Frankfurter in delivering the opinion of the Court in the *Bunte Bros.* case emphasized the distinction between statutes:

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system.

* * *

". . . An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. The problem before us is very different from that which was recently presented by U. S. v. Darby, 312 U. S. 100. We had there to consider the full scope of the constitutional power of Congress under the commerce clause in relation to the subject matter of the Fair Labor Standards Act. This case presents a narrow question of what Congress did, not what it could do. And we merely

hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

(*Federal Trade Comm.* v. *Bunte Bros. Inc.*, 312 U. S. 348, 353, 355)

An examination of the development of the structure of the Congressional *pattern* of Federal control *actually* enacted by Congress in both the Natural Gas Act and the Federal Power Act, discloses that Congress wholly failed and actually refused to extend the coverage of Federal control, as sought by the Commission in 1935 and as now claimed by its counsel (*See, Br. Amici Curiae, on Pet. for Cert. pp. 15-24; Br. Amici Curiae on Pet. for Rehearing, pp. 7-11*).

This case is not, on the facts or in principle, the *Kansas Gas Company* case (265 U. S. 298) or the *Attleboro Company* case (273 U. S. 83), as assumed by Commission counsel.

In the *Kansas Gas Company* case *that Company* produced and purchased natural gas in Oklahoma; *that Company* thereupon transported that gas to Kansas, where it was intermingled with gas there produced and purchased; and thereafter *that Company* continued the transportation of the commingled gas into Missouri, where *that Company* sold it for resale. *All* the operations and activities in question from Oklahoma to Missouri were those of a *single* company, *actually* engaged both in transportation in interstate commerce and sale in the state of destination at the end of such interstate transportation. (See Br. Amici Curiae on Pet. for Cert. pp. 42-43).

In the *Attleboro Company* case, the Narragansett Company generated the electric energy there in question at East Providence, Rhode Island; *that Company* transmitted the energy to the state line between Seekonk, Massachusetts, and East Providence, Rhode Island, where it made delivery

to the *Seekonk Company*, a corporation created by the Narragansett Company to transmit the energy from the Massachusetts state line to *the meters of the Narragansett Company* at Attleboro, Massachusetts, after which delivery was made by the Narragansett Company to the Attleboro Company. Here again *all* the operations and activities in question from East Providence, Rhode Island to Attleboro, Massachusetts, where sale and delivery was made and consummated, were those of a *single* company, the Narragansett Company. *That Company* directly and through its creature, the Seekonk Company, actually engaged both in transportation in interstate commerce and sale in the state of destination at the end of the interstate transportation. *(See, Br. Amici Curiae on Pet. for Cert. pp. 44-47).*[2]

This Court is aware of the fact that the local field "sale and delivery" of natural gas by Interstate Company to each of the three interstate pipeline companies took place **before** any interstate transportation and the subsequent sales for resale "in states other than Louisiana" by the respective interstate pipeline companies (Findings Nos. 7, 8). The court also will observe that the "sale and delivery" of natural gas and electric energy involved in the *Kansas Gas* and *Attleboro* cases took place **after** interstate transportation, and that in each case the "sale and delivery" in the state of destination was made by *the same company* which in fact engaged in the interstate transportation of the natural gas and electric energy in question from the states of origin.

Thus the factual and legal basis upon which the *Kansas Gas* and *Attleboro* cases are laid is the *actual*, not synthetic, transportation across state lines and the *actual*, not synthetic, subsequent delivery and sale in the state of destination, *all by one company, constituting a single integrated enterprise.* Such is not this case nor claimed by Commission counsel to be this case.

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[2] For full statement of record facts in *Attleboro* case, see 46 R. I. 496, 129 Atl. 495.

*On the record,* it cannot be maintained and neither the Commission nor the Court of Appeals has undertaken to maintain that *after* such local and absolute field sales and deliveries by Interstate Company, it *in fact or in law,* has any right or interest in such gas, has any liability of any kind with respect thereto, has any control or right of control whatever over such gas, its transportation, its destination, its disposition or its ultimate use, or has any interest or concern whatever in the subsequent sales thereof or the proceeds of such sales.

With respect to the gas here involved, Interstate Company does not engage in any commerce between any point in Louisiana and any point outside of that State. All "interstate commerce" in such gas occurs *after* the local field sales and deliveries by Interstate Company which the Commission found were consummated in the Monroe Field, Louisiana. (*R. V. 1. pp. 82-83*).

The jurisdictional standards of the Act are clear and certain when the express limitation of the Commission's jurisdiction to transportation and sale "in interstate commerce", i.e., "between any point in a State and any point outside thereof" (Sec. 2(7)), is applied in connection with the statutory exclusion of jurisdiction over "production or gathering of natural gas". By that standard production, gathering, transportation, if any, prior to the consummated local sales and deliveries at Perryville and at Guthrie and such local sales and deliveries, are all beyond the regulatory jurisdiction of the Commission.

Congress, as is disclosed affirmatively, by the Act, by the development of the structure thereof, by the history of the legislation and by the common sense of the situation, intended no such confusion, no such conflict, no such intrusion of federal administrative authority into local affairs, and no such regulation of the oil and gas industries, as is the im-

pending and inevitable result of the current administrative assumptions as to the virtually limitless regulatory jurisdiction of the Commission over the natural gas industry and those engaged in any and every phase of that business.

Respectfully submitted,

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